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STATEMENT OF CONGRESSWOMAN BARBARA BOXER

before the Legislation and National Security Subcommittee
House Government Operations Committee

Federal Employee Secrecy Agreements

December 20, 1989

Mr. Chairman, I applaud you for taking the time this week, when so many of us are distracted by holiday preparations, to hold this very important hearing. Your sense of urgency is justified. The Administration's decision to defy the law banning the use of the flawed Standard Forms 312 and 4355 to restrict the unauthorized disclosure of classified information is outrageous and demands swift congressional response.

Mr. Chairman, as you know, this crisis is only the latest episode in ongoing efforts between the executive and legislative branches to negotiate an agreement on the proper and appropriate use of "non-disclosure" forms. Unfortunately, time and time again our negotiations with the Administration have proven fruitless. At the heart of the debate is the need to strike a balance between two requirements for sound, effective government: the need of the executive branch to protect national security secrets on the one hand and of the legislative branch to receive critical information from whistleblowers in order to exercise its oversight responsibilities.

A number of my colleagues and I, including your predecessor, the former chairman of this Committee, Mr. Brooks, have been concerned since earlier versions of these forms, known as Standard Forms 189 and 4193 were first promulgated by the Reagan Administration. For instance, we objected to holding federal employees liable for "classifiable" information. We felt the term was so vague it could be used to punish whistleblowers after they made a disclosure that turned out to be embarrassing to an executive agency.

Members of Congress tried in good faith, two years ago, to come to an agreement with the Administration about these forms. But those discussions failed so we were forced to resort to a legislative prohibition against the promulgation of Standard Forms 189 and 4193. Despite the ban, the Administration continued to ask employees to sign the forms, as they are doing now. My congressional colleagues and I, along with unions representing federal employees, went to Court.

As a result, the term "classifiable" was dropped in the new forms, 312 and 4355, but other problems remained. The most serious of these is the Administration's insistence that in the case of unmarked information employees have a duty to inquire of their superiors if the unmarked information might be classified, and they are liable if they "should have known" the information was

classified. My collegues and I believe this requirement is as onerous as that holding employees responsible for "classifiable" information. It is a deterrent to whistleblowers who seek anonymity and fear reprisals from those with whom they are supposed to consult. However, we tried to compromise by asking that guidance be issued to all federal employees signing the forms about the duty to inquire, but the Administration refused to consider such guidance.

Therefore, we felt we had no choice but to extend the ban on the use of non-disclosure forms, this time, SFs 312 and 4355, which replaced the earlier non-disclosure forms, 189 and 4193. The ban was included in section 618 of the FY 90 Treasury, Postal Service, and General Government Appropriations Act signed by the President. My colleagues and I stated for the record that we hoped the continued moratorium would give us more time for negotiations with the Administration.

Unfortunately, President Bush has decided to creatively reinterpret his obligations under the law. He says he will implement Section 618 "in a matter consistent with the Constitution." That is double talk. In fact, Mr. Garfinkel, Director of the Information Security Oversight Office, has placed the Administration above the law, thus compounding the profound constitutional questions this whole case has so far evoked.

Mr. Chairman, we must deal swiftly and effectively with Mr. Garfinkel's blatant flouting of the law when he instructed executive agencies to "continue to implement and enforce the SF 312 as you have in the past." Mr. Garfinkel has been guilty in the past of not dealing in good faith with Congress. This time, he has gone too far.

Neither I nor any of my colleagues involved in this issue would deny the President his right to protect information that has been through a legitimate classification review process and been clearly marked as classified. That is consistent with current law and Executive Order 12356. But holding individuals responsible for unmarked information carries the potential for abuse and must be resolved through negotiations between the legislative and executive branches.

Mr. Chairman I commend you for holding this hearing, which I hope will be the first of a series of hearings to investigate how the decision to break the law was made and who in the Information Security Oversight Office and in the Justice Department is responsible. Corrective action directed at Mr. Garfinkel and other individuals involved in the decision must be the result.

I look forward to working with you Mr. Chairman, to determine the next appropriate course of action.

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